



Ohio Transfer Call - Message about 123.27(a)(3)(ii) Note

Michael Berman to: aaron.farmer, Elder, James Morgan,
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Cc: Julianne Socha

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Following is a message from our Office of General Counsel concerning one of the questions we discussed on our last call.

Michael

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From: Sylvia Horwitz/DC/USEPA/US
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Date: 07/27/2012 02:37 PM
Subject: Re: Fw: Ohio Transfer Call - via Mike Berman

J.T. -

If I understand the question correctly, there is an issue regarding the the note in 40 C.F.R. 123.27(a)(3)(ii) and its relationship to section 123.27(b)(2). The short answer is that the note in section 123.27(a)(3)(ii) is not relevant to section 123.27(b)(2). Since the note doesn't relate to section 123.27(b)(2), it can't "take precedence" over that section.

40 C.F.R. 123.27(b)(2) requires that the authorized state have no higher burden of proof to establish a violation for which civil penalties or criminal remedies are recoverable than the burden of proof required under Federal law when EPA is prosecuting an action. The note in section 123.27(a)(3)(ii) does not relate to the burden of proof for civil enforcement authority required for state authorization. It concerns only the adequacy of the state's authority to recover criminal fines against a person found to have "willfully or negligently violate[d] any applicable standards or limitations; . . ." In other words, section 123.27(a)(3) is about having adequate legal authority to impose the various remedies set forth in that section. It has nothing to do with establishing that the standards or limitations were violated in the first place.

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